

PREPARING FOR THE LEGALIZATION OF MARIJUANA¹

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INTRODUCTION

Starting on August 1, 2023, Minnesotans 21 and older can legally use and possess marijuana.² The legalization of marijuana has broad implications for the workplace and creates an interesting interplay with Minnesota’s Drug and Alcohol Testing in the Workplace Act (“DATWA”).³ As August 1st approaches, employers should ensure their policies and procedures comply with DATWA and the new law that legalizes marijuana.

Pre-Employment Testing

Under DATWA, employers⁴ may require pre-employment drug and alcohol testing in limited circumstances. Testing must be done pursuant to a written policy and so long as the testing is conducted by an independent lab.⁵ The testing may only be conducted after an offer of employment has been made, and the testing must be required of all applicants offered employment for the particular position. If an employee’s test is positive, the results must be verified by a second test before the offer of employment can be withdrawn.

Under the new law legalizing marijuana, employers cannot refuse to hire an individual for a positive marijuana result, unless doing so would violate other laws, result in the loss of government money, or result in the loss of licensing-related benefits.⁶ If so, the requirement for a confirmatory test under DATWA is triggered.

In summary, employers can still require pre-employment testing but cannot withdraw an offer of employment if an applicant tests positive for marijuana unless the employer will be violating other laws or lose government benefits, and a confirmatory test is also positive.

¹ DISCLAIMER: NOTHING IN THIS ARTICLE IS TO BE RELIED UPON AS LEGAL ADVICE. FURTHER, NOTHING IN THIS ARTICLE CREATES AN ATTORNEY-CLIENT RELATIONSHIP BETWEEN THE READER AND BASSFORD REMELE, P.A. ADDITIONALLY, THIS ARTICLE IS NOT AN EXHAUSTIVE ANALYSIS OF DATWA AND THE NEW LAW LEGALIZING MARIJUANA. YOU SHOULD CONTACT YOUR ATTORNEY IF YOU HAVE SPECIFIC QUESTIONS ABOUT DATWA AND THE NEW LAW.

² Minn. Stat. Ch. 342.

³ Minn. Stat. § 181.951.

⁴ DATWA applies to any employer with one or more employees. Minn. Stat. § 181.950, subd. 6.

⁵ Minn. Stat. § 181.951(b).

⁶ Minn. Stat. § 342.57.

Testing During Employment

A. *Testing Pursuant to a Routine Annual Exam or Randomly*

An employer may require testing as a part of an annual routine physical exam. If drug and alcohol testing will be part of the physical exam, an employee⁷ must be provided written notice at least two weeks ahead of the physical exam.⁸

Random testing is permitted in two circumstances. The first is employees who work in safety-sensitive positions. A safety-sensitive position is one where the impairing effect of drugs or alcohol would threaten the health or safety of others (e.g., heavy equipment operators, flag persons, medical personnel).⁹ The second is where the employee is a professional athlete subject to a collective bargaining agreement.

Importantly, random testing must be done in a manner that ensures an equal probability that any employee subject to selection will be selected and does not permit an employer to waive testing for an employee who has been randomly selected for testing.¹⁰

As with the pre-employment testing, the new law legalizing marijuana prohibits adverse employment action if an employee tests positive for marijuana unless the employer will be violating other laws or lose government benefits. Additionally, an employer can take action if the employee used, possessed, sold, transported, or was impaired while on work premises, while working, or while operating the employer's equipment. Again, the requirement for a confirmatory test under DATWA must be followed.

B. *Testing Pursuant to Reasonable Suspicion*

An employer may require testing if it has a reasonable suspicion that an employee (a) is under the influence; (b) has violated work rules related to use, possession, sale or transfer; (c) has suffered an injury while working or caused injury to another employee; or (d) has been involved in a work-related accident.¹¹ A "reasonable suspicion" is defined as a "basis for forming a belief based on specific facts and rational inferences drawn from those facts."¹²

C. *Handling a Positive Test*

Under the new law legalizing marijuana, an employer cannot take action against an employee for a drug test that is positive for marijuana, unless the employee had or used it while on the

⁷ An employee includes independent contractors and person's working for an independent contractor. Minn. Stat. § 181.950, subd. 6.

⁸ Minn. Stat. § 181.951, subd. 3.

⁹ Minn. Stat. § 181.950, subd. 12.

¹⁰ Minn. Stat. § 181.950, subd. 11.

¹¹ Minn. Stat. § 181.953, subd. 5.

¹² Minn. Stat. § 181.950, subd. 13.

employer's premises, during work hours, or while operating the employer's machinery, vehicle, or equipment.¹³

Under DATWA, there are numerous actions that an employer may need to take after requiring a drug or alcohol test. The actions include but are not limited to, providing notice of test results, offering a confirmatory retest, and offering the opportunity to participate in drug and alcohol programming.¹⁴ Importantly, employers should not take any adverse employment action until there has been a confirmatory test with positive results.¹⁵

Policies and Procedures Related to Testing

DATWA requires employers to have a policy if the employer intends to request or require drug and alcohol testing of its employees.¹⁶ The policy must contain the following information: (a) who is subject to testing; (b) the circumstances for which testing may be requested or required; (c) notice of the right to refuse and the consequences of refusing testing; (d) the consequences of a positive test result; (e) notice of the right to explain a positive result and payment for a retest; and (f) appeal procedures.

With the legalization of recreational marijuana, existing policies may need to be updated to reflect the limitations associated with a positive marijuana test.

CONCLUSION

While it is important to ensure workplaces are safe and employees can safely perform their job duties through drug and alcohol testing, the testing must be done in compliance with DATWA and the new law legalizing marijuana. Failure to do so may expose employers to litigation. The biggest concern for an employer will be the risk that an employee will be awarded attorney fees which are permitted under both DATWA and the new law legalizing marijuana. In many instances, the attorney fee award may exceed the individual's actual damages. With the coming legalization of marijuana, now is as good a time as any to review and update policies and procedures related to drug and alcohol testing.

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¹³ Minn. Stat. § 342.57, subd. 5.

¹⁴ Minn. Stat. § 181.953.

¹⁵ Minn. Stat. § 181.953, subd. 10(a).

¹⁶ Minn. Stat. § 181.951, subd. 1(b).